

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

UNITED STATE OF AMERICA,

Plaintiffs,

vs.

MICHAEL NORTON, et al.,

Defendants.

Case No: CR 07-0683 DLJ

**ORDER DENYING DEFENDANT BRIAN
EVERETT'S MOTION TO DISMISS
COUNT EIGHT OF THE
SUPERSEDING INDICTMENT**

On July 23, 2010, the Court heard Defendant Brian Everett's ("Defendant's") Motion to Dismiss Count Eight of the Superseding Indictment. At the hearing the government was represented by Robert Rees and defendant Brian Everett was represented by Jerome Matthews. Everett was joined in the motion by his codefendants, who were represented as follows: defendant Winslow Norton was represented by Doron Weinberg; defendant Abraham Norton was represented by Harold Rosenthal; and defendant Michael Norton was represented by William Osterhoudt. After reviewing the legal briefs, documents submitted, oral arguments, and applicable law, the Court DENIES the motion.

I. BACKGROUND

A. Factual Background and Procedural History

In 1996, California voters passed an Initiative called the Compassionate Use Act ("CUA"). The CUA legalized the cultivation, distribution, and use of marijuana for medical purposes. See Cal. Health & Safety Code § 11362.5.

1 From 2004 to 2007, Defendants owned and operated a medical
2 marijuana dispensary in Hayward, California called the
3 Compassionate Collective of Alameda County (later renamed the
4 Compassionate Patients' Cooperative of California). Defendants
5 allege that their Collective operated in total compliance with
6 California State law: it secured a permit to operate from the
7 Alameda County Sheriff; it obtained a seller's permit from the
8 California Board of Equalization; it complied with local police
9 periodic audits and inspections; and it paid taxes to the state.

10 Defendants further assert that the permit application process
11 required that CCAC submit a detailed plan for maintaining security
12 at the premises. To meet this requirement, CCAC contracted with a
13 company called Seal-Mar Protection Services to provide armed
14 guards at its Hayward location.

15 **B. The Superseding Indictment**

16 In 2007, the federal government indicted Winslow and Abraham
17 Norton for drug trafficking, in violation of 21 U.S.C. § 841(a)
18 and 21 U.S.C. § 864. In February 2009, the government added
19 Michael Norton and Brian Everett as defendants by way of a
20 Superseding Indictment. The Superseding Indictment also added a
21 charge of carrying a firearm in relation to drug trafficking and
22 of possession of a firearm in furtherance of drug trafficking
23 under 18 U.S.C. § 924(c)(1)(A). The charge was charge was
24 premised upon Seal-Mar having provided armed guards to maintain
25 security at CCAC's Hayward location.

26 Count Eight of the Superseding Indictment, which is the

1 subject of this motion to dismiss provides as follows:

2
3 COUNT EIGHT: (18 U.S.C. § 924(c)(1)(A) and 2-Use and Carry Firearm
4 In Relation To A Drug Trafficking Crime)

5 Beginning in or about October 2005, and continuing to in or
6 about October 2007, in the Northern District of California,
7 in the County of Alameda, the defendants, WINSLOW NORTON,
8 ABRAHAM NORTON, BRIAN EVERETT, and Michael NORTON, did,
9 during and in relation to a drug trafficking crime for which
10 the persons may be prosecuted in a court of the United
11 States, as charged in Counts One through Seven, aid and abet
12 the use of and the carrying of a firearm, and in furtherance
13 of any such crime, did aid and abet the possession of a
14 firearm, in violation of Title 18, United States Code,
15 Sections 924(c)(1)(A) and 2.

16 In the conspiracy count of the Superseding Indictment, the
17 following allegations are relevant to this motion:

18 c. EVERETT was employed at CCAC as the manager, responsible
19 for a variety of duties, including purchasing marijuana to be
20 sold at CCAC, selecting the price to sell the various strains
21 of marijuana, and generally running the business.

22 d. The defendants employed an armored car service to
23 transport the marijuana sales proceeds from the Mission
24 Boulevard location to the Bank of America.

25 e. The defendants employed armed guards at CCAC and 578 West
26 Grand Avenue, Oakland CCAC was surrounded by an approximately
eight-foot fence, topped by barbed-wire along the sides and
rear of the facility. An armed guard controlled vehicle
access into CCAC through an electronically controlled gate.

s. In or around the end of September 2005, MICHAEL NORTON and
BRIAN EVERETT met with representatives of Seal-Mar Protection
Services at CCAC to discuss contracting for the services of
armed guards at CCAC and at 578 West Grand, Oakland.

t. On or about October 4, 2005, WINSLOW NORTON, ABRAHAM
NORTON, MICHAEL NORTON, and BRIAN EVERETT again met with
representatives of Seal-Mar Protection Services at CCAC to
discuss contracting for the services of armed guards at CCAC
and at 578 West Grand, Oakland.

1 u. On or about October 4, 2005, WINSLOW NORTON signed a
2 contract on behalf of CCAC with Seal-Mar Protection Services
3 to provide armed guards at CCAC and at 578 West Grand,
4 Oakland.

5 On November 23, 2009, this Court ordered the government to
6 file a bill of particulars identifying:

7 1) [a]ny firearm contended by the Government to be an element
8 of a violation of 18 U.S.C. § 924(c), and 2) any person
9 contended by the Government to have been aided and abetted by
10 any Defendant in a violation of 18 U.S.C. § 924(c).

11 On April 9, 2010, the government filed a Bill of Particulars
12 containing a list of 44 persons described by the government as
13 persons who "guard[ed] narcotics while armed." Id. at 1-3. The
14 government also incorporated as a part of the Bill of Particulars
15 two lists it received from Seal-Mar security. Exhibits C and D to
16 the Motion. The first is a list of Seal-Mar employees with their
17 names, along with a description of whether they were "armed" or
18 "unarmed," and it also lists a location, presumably where they
19 were deployed and in what capacity (ie. "HAYWARD,"
20 "HAY/OAK/TRANSPORT"). The government provides no further
21 explanation of these phrases. The second list again lists the
22 employee names along with a description of what firearms,
23 including calibers and gun models, were possessed by each of them.
24 Id. at 3-4.

25 Neither the Indictment nor the Bill of Particulars alleges
26 that any of these 44 persons violated § 924(c)(1)(A) or was a
conspirator in the underlying marijuana distribution conspiracy.

1 The introduction to the Bill of Particulars does state, however,
2 that the government is alleging the violation of § 924(c) under a
3 § 2(b) "causing" theory, as well as a § 2(a) "aiding and abetting
4 theory." While the Indictment specifically alleges that
5 defendants "aided and abetted" the 924(c) violation, it does not
6 allege that defendants "caused" others to carry or possess any
7 firearms in violation of § 924(c).

8 Everett has moved to dismiss Count Eight of the Superseding
9 Indictment. He is joined in the motion to dismiss by his co-
10 defendants.

11 **II. Applicable Law**

12 The Fifth Amendment "requires that a defendant be convicted
13 only on charges considered and found by a grand jury." United
14 States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999); see also
15 Stirone v. United States, 361 U.S. 212, 217 (1960). The Indictment
16 must set forth all the essential elements and facts of the charged
17 offense. Fed. R. Crim. P. 7(c)(1); Du Bo, 186 F.3d at 1179.

18 The district court is required to determine the sufficiency
19 of the Indictment to ensure that it provides defendant with
20 meaningful notice of the charges faced. See United States v. ORS,
21 Inc., 997 F.2d 628, 629 n.3 (9th Cir. 1993). A defendant may move
22 before trial for dismissal of an Indictment on the grounds that it
23 is defective or fails to state an offense. Fed. R. Crim. P.
24 12(b)(3)(B); see also Russell v. United States, 369 U.S. 749, 768
25 n.15 (1962) (explaining that an Indictment serves the additional
26

1 purpose of providing the court an opportunity to determine whether
2 the allegations legally suffice for a conviction).

3 In deciding a pre-trial motion to dismiss the Indictment, a
4 district court generally is bound by the four corners of the
5 Indictment, United States v. Boren, 278 F.3d 911, 914 (9th Cir.
6 2002). A bill of particulars cannot improve an invalid Indictment.
7 United States v. Cecil, 608 F.2d 1294, 1296 (9th Cir. 1979) ("If a
8 bill of particulars were allowed to save an insufficient
9 Indictment, the role of the grand jury as intervenor would be
10 circumvented.").

11 **III. DISCUSSION**

12 Everett moves to dismiss Count Eight of the Superseding
13 Indictment for several reasons. First, he argues that as to
14 himself it does not state a federal offense in that the Indictment
15 "fails to allege either the essential facts of a principal's
16 underlying § 924(c) offense or those of the specific--intent and
17 direct facilitation--or encouragement elements of the crime of
18 aiding and abetting a violation of § 924(c)." Everett also seeks
19 dismissal on the alternative ground that § 924(c) does not
20 appropriately apply to a marijuana dispensary if the dispensary
21 operated under the auspices of, and in compliance with, the laws
22 of the State of California.

23 A. Should Count Eight be dismissed because defendants were
24 acting in accordance with state law?

25 The last of defendant's arguments is the more straightforward
26 one. Defendant attacks Count Eight on the theory that the

1 dispensary was operating in full compliance with state law;
2 therefore it is unfair to charge him federally. The government
3 takes issue both with defendant's factual assertion that the
4 dispensary was in total compliance with state law, and also the
5 legal argument as to the effect of any such compliance on federal
6 charges.

7 The government contends that Federal statutes apply equally
8 to all citizens no matter in which state they live in. "To make an
9 exception allowing guns and drugs to mix in California, but not in
10 other parts of the country, is not only unfair, it likely violates
11 multiple provisions of the Constitution, including the Supremacy
12 Clause and the Equal Protection Clause." Opposition at pages 4-5.
13 See, e.g., Free v. Bland, 369 U.S. 663, 666 (1962) (noting "that
14 any state law, however clearly within a State's acknowledged
15 power, which interferes with or is contrary to federal law, must
16 yield" to the Supremacy Clause. Consistent with our traditional
17 notions of federalism, the Court finds that the constitution does
18 not prevent the government from bringing an Indictment under
19 federal law despite defendants' affirmances that they were acting
20 in accordance with California State law. The Court further notes
21 that the Supreme Court has not recognized a medical-necessity
22 exception to the Controlled Substances Act. See United States v.
23 Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001).

1 B. Should Count Eight be dismissed based on the alleged
2 insufficiency of the Superseding Indictment?

3 Everett argues that the Superseding Indictment is fatally
4 flawed in several aspects. First, Everett argues that the
5 government may not proceed on a theory that he "caused" another to
6 carry or use a gun in violation of 18 U.S.C § 924(c), because that
7 theory of liability as embodied in 18 U.S.C. § 2(b) was not
8 specifically asserted in the Superseding Indictment. Defendant
9 next argues that the Superseding Indictment does not allege
10 sufficient facts for him to know who the principal was that he
11 allegedly aided and abetted or caused to use the gun. Finally
12 Everett argues that even if all of the factual allegations of the
13 Superseding Indictment were proven, as to him, those facts are not
14 sufficient to prove that Everett himself had any involvement with
15 arranging for guns, and thus he could not be found guilty of
16 924(c). The Court will take up each argument in turn.

17 1. Can the government maintain its theory that defendant
18 "caused" others to carry guns in violation of 924(g) even
19 though that theory of liability is not explicitly stated
20 in the Superseding Indictment?

21 Defendants can be found guilty of 924(c) on different
22 theories of liability. They can commit the offense directly; they
23 can aid and abet another who commits the offense; they can cause
24 another person to commit an offense or cause the commission of a
25 required element of an offense; or they can be a member of a
26 conspiracy when an offense is committed by another person acting
in furtherance of the conspiracy.

1 In common with all other crimes, a violation of 924(c)
2 requires both an act and an intent. The physical component
3 requires an act of using or carrying a firearm during and in
4 relation to a drug trafficking crime or of possession of a firearm
5 in furtherance of such a crime. The mental component requires
6 that a person knows of the drug trafficking and commits the act
7 with a firearm with the intent to aid the commission of the drug
8 trafficking.

9 18 U.S.C. § 2 provides:

- 10 (a) Whoever commits an offense against the United States or
11 aids, abets, counsels, commands, induces or procures its
12 commission, is punishable as a principal.
- 13 (b) Whoever willfully causes an act to be done which if
14 directly performed by him or another would be an offense
15 against the United States, is punishable as a principal.

16 The Indictment in this case specifically alleges that
17 defendants "aided and abetted" the 924(c) violation, but it does
18 not allege any other thesis for liability. Defendant argues that,
19 because of that circumstance, the government cannot then seek a
20 conviction under any other theory of liability at trial.

21 The government argues that because Count Eight invokes 18
22 U.S.C. § 2, that reference is broad enough to include liability
23 under both § 2(a) and § 2(b), and that such broad liability "was
24 affirmatively invoked by the Grand Jury in the superseding
25 Indictment." See United States v. Armstrong, 909 F.2d 1238, 1242
26 (9th Cir.1990).

1 In Armstrong, the defendant alleged that the Government
2 materially amended the Superseding Indictment by implying an
3 aiding and abetting charge where the Superseding Indictment only
4 specifically charged Armstrong with "causing" another to make
5 false entries in federal firearms transaction records in violation
6 of 18 U.S.C. § 922(m) and 18 U.S.C. § 2(b). At trial, the
7 Government proceeded on the theory that Armstrong could be found
8 guilty of either causing the violation under § 2(b) or aiding and
9 abetting the violation under § 2(a), arguing that aiding and
10 abetting is implied in every federal Indictment, whether or not it
11 is specifically mentioned. The district court agreed and
12 instructed the jury accordingly.

13 The Court of Appeals, in affirming the trial court, held that
14 "[a]ll Indictments must be read in effect, then, as if the
15 alternatives provided by 18 U.S.C. § 2 were embodied in each count
16 thereof." Id at 1242. Under the holding of Armstrong this Court
17 finds that the charge of any offense, in and of itself, impliedly
18 invokes the possibility of finding a defendant guilty on any
19 theory of liability, and finds that the motion to limit the
20 government to an aiding and abetting theory of liability must be
21 denied.

22 However, in order to prove that the defendant Everett
23 "caused" a violation of 924(c) the government will be required to
24 prove that he had the culpable state of mind necessary to
25 establish a violation of the statute; and that he did in fact
26 cause another person to commit the physical component of a 924(c)

1 violation; and that Everett intended that the act he caused would
2 further the drug trafficking activity.

3 Failure of the government to allege the "causing" thesis of
4 liability in the Superseding Indictment, however, raises an
5 obvious and troubling question of whether or not evidence to
6 support the thesis was presented to the Grand Jury. Since there
7 is no pre-trial mechanism for the Court to review the sufficiency
8 of the evidence which was presented to the Grand Jury; and that
9 there is no apparent duty placed on the government to plead all
10 theories of liability; and that the government avers that "[a]s a
11 factual matter, therefore the entirety of § 2 liability, both
12 under § 2(a) and § 2(b), was affirmatively invoked by the Grand
13 Jury in the superseding Indictment" (Opp. at 4:21-24) the Court
14 will permit the government to proceed with the causing theory of
15 liability at trial.

16
17 2. Does the Superseding Indictment contain sufficient
18 information for the Defendant to be on notice of the
19 charges against him?

20 Defendant's first argument in this regard is that even if the
21 government can prove that another person committed a § 924(c)
22 offense the government has no evidence that Everett was more than
23 merely aware of the guns being used and that mere awareness is
24 insufficient. United States v. Bancalari, 110 F.3d 1425, 1429-30
25 (9th Cir. 1997) (holding that direct facilitation or encouragement
26 of the use, carrying, or possession of a gun in relation to the
underlying crime is necessary and that mere awareness thereof is

1 insufficient for aiding-and-abetting liability under
2 §924(c)(1)(A). While this may be a correct statement of the law
3 in the abstract, Bancalari is a post-trial case in a totally
4 different procedural posture than this case.

5 Here, in essence, Everett is arguing that the evidence will
6 not be sufficient to establish his culpable state of mind. It is
7 true that this element of the offense must be proven by the
8 government, but that is a matter for trial. The Rules of Criminal
9 Procedure do not permit a defendant to argue the sufficiency of
10 the prosecution's evidence in advance of trial. Fed. R. Crim.P.
11 12(b)(3)(B). That is to say, there is no equivalent to summary
12 judgment in a criminal case. The question, then for this Court is
13 whether the Constitution has been violated by an insufficiency in
14 the pleadings in the Indictment. The Court finds that no
15 constitutional violation has been shown here.

16 The second argument of the defendant is that the Indictment
17 is deficient in that it must, but does not, allege the specific
18 person who violated 18 U.S.C. § 924(c)(1)(A) and was aided and
19 abetted by Everett. See United States v. Sutcliffe, 505 F.3d 944,
20 959 (9th Cir. 2007)("There is no question that a conviction for
21 aiding and abetting a crime requires proof that the underlying
22 crime was committed").

23 The elements of aiding or abetting the use and carrying of a
24 firearm in relation to, or the possession of a firearm in
25 furtherance of, a drug-trafficking crime are:
26

- 1 (1) the defendant specifically intended to aid an armed drug-trafficking crime; and
- 2 (2) the defendant directly facilitated or encouraged someone else;
 - 3 (a) in using or carrying a firearm during and in relation to a drug-trafficking crime; or
 - 4 (b) in possessing a firearm in furtherance of a drug-trafficking crime.

5

6 Derivative liability as an aider-and-abettor to a

7 § 924(c)(1)(A) offense requires proof that another person actually

8 committed the offense. 18 U.S.C. § 2; Sutcliffe, 505 F.3d at 959

9 ("There is no question that a conviction for aiding and abetting a

10 crime requires proof that the underlying crime was committed ...").

11 The government asserts that Count Eight of the Superseding

12 Indictment alleges each of the elements required, and that is all

13 that the government must do at this juncture. According to the

14 government, the Superseding Indictment is adequate to put

15 defendant on notice of the charges against him, and provides

16 specifics as to when and how each of these elements occurred. See

17 e.g., United States v. Christopher, 700 F.2d 1253, 1257 (9th Cir.

18 1983) ("An Indictment should be read in its entirety, construed

19 according to common sense and interpreted to include facts which

20 are necessarily implied).

21 Defendant counters citing United States v. Keith, 605 F.2d

22 462, 464 (9th Cir. 1979) that an Indictment is inadequate when it

23 fails to allege an essential element of the offense even when it

24 tracks the language of the statute. Defendant argues that

25 "nowhere does the Indictment allege that any of the 44 security

26

1 personnel identified in the Bill of Particulars was criminally
2 responsible for drug trafficking."

3 It is clear that the government may proceed against
4 defendants without first prosecuting the alleged principal. United
5 States v. Causey, 835 F.2d 1289, 1291 (9th Cir. 1987)("the failure
6 to prosecute or to obtain a prior conviction of that individual
7 does not preclude the conviction of the aider and abettor"). The
8 government will still have to prove at trial that someone other
9 than the defendant did in fact commit the substantive crime, and
10 that the defendant aided and abetted that person. The same
11 reasoning is applicable to a prosecution based on "causing" under
12 § 2(b). The government will have to prove that someone other than
13 the defendant carried out the physical component of a 924(c)
14 offense and that the defendant did in fact cause that person's
15 conduct.

16 Regardless of the issues to be resolved at trial, the
17 question remains as to whether the Superseding Indictment
18 sufficiently puts the defendants on notice of who it was that they
19 aided and abetted or caused to act.

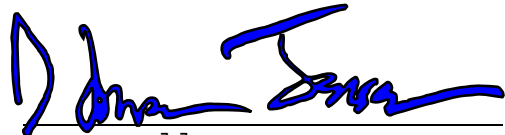
20 The text of the Superseding Indictment, both by inclusion and
21 exclusion, makes it clear that the physical component of the
22 924(c) charged was not carried out by a named defendant, but
23 rather by a third person. It further describes that third person
24 as an armed guard employed by Seal-Mar Protection Services working
25 at one of the premises used by the defendants during the timeframe
26 of the alleged conspiracy. The Court believes that this is

1 sufficient notice under the present law and notes that the force
2 of the argument about a lack of specificity is significantly
3 weakened by the Bill of Particulars which limits the pool of
4 possible third persons and their firearms, and by the fact the
5 government has agreed to provide the names of specific witnesses
6 and any relevant Jencks Act material far enough in advance of
7 trial to permit defense investigation.

8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court denies the Motion to
10 Dismiss Count Eight of the Indictment.

11
12 DATE: September 10, 2010



D. Lowell Jensen
United States District Court